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No. 93-397

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,

vs.

JANETTE M. LOHMAN, Director of Revenue, and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES,
THE MISSOURI MUNICIPAL LEAGUE, and
THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Missouri

BRIEF OF RESPONDENT JANETTE M. LOHMAN, DIRECTOR OF REVENUE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Opinion (joined in by 6 of the 7 judges) of the Missouri Supreme Court and the Dissenting Opinion filed June 29, 1993, are reproduced as Appendix A to the Petition for Writ of Certiorari at A-1. The unreported Judgment of the Circuit Court

of Cole County dated July 15, 1992, is reproduced as Appendix B to the Petition for Writ of Certiorari at A-35.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Missouri Supreme Court was entered on June 29, 1993. Petitioners did not file a motion for rehearing as is authorized by Rule 84.17, Missouri Rules of Civil Procedure. Petitioners assert jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional and statutory provisions set forth in the Petition for Writ of Certiorari, the following provisions are noted:

CONSTITUTION OF MISSOURI, Article X, § 1:

> "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

CONSTITUTION OF MISSOURI, Article X, § 10(b):

> "Nothing in this constitution shall prevent the enactment of general laws directing the payment of funds collected for state purposes to counties or other political subdivisions as state aid for local purposes."

The Missouri General Assembly has authorized local governments (primarily counties and municipalities) in Missouri to impose multiple sales taxes on sales of tangible personal property sold within their jurisdictions. These are authorized, *inter alia*, by Sections 66.600 to 66.635, 67.500 to 67.545, 92.400 to 92.420, 94.500 to 94.519, 94.600 to 94.655, and 94.700 to 94.745, RSMo. There are no Missouri statutes which authorize local governments in Missouri to impose use taxes.

STATEMENT OF THE CASE

The Brief in Opposition to the Petition for Writ of Certiorari of Respondents Missouri Association of Counties, Missouri Municipal League, Delongs Incorporated, City of Blue Springs, Gary Markenson, and Associated General Contractors of Missouri (hereinafter referred to as "Respondents-Intervenors"), contains a thorough statement of the case and, therefore, is not repeated herein. For purposes of this brief, however, provided below is a description of the Missouri sales and use tax statutes.

The Missouri use tax rate equals 5.725% and is uniform among all counties and municipalities in Missouri. The use tax rate of 5.725% equals the sum of the use tax rate of 4% imposed by § 144.610, RSMo, the 1.5% rate imposed by § 144.748, RSMo, and the .225% rate imposed by §§ 43(a) and 47(a) of the Constitution of Missouri (1945, as amended). The use tax rate of 5.725% is hereinafter collectively referred to as the "uniform use tax rate."

The Missouri sales tax rate that is imposed on a statewide level equals 4.225%. Section 144.020, RSMo, and §§ 43(a) and 47(a) of the Missouri Constitution. County and municipal governments, however, are authorized, but not required to, impose additional sales tax on sales occurring within their jurisdiction. Therefore, depending upon the rate of additional sales tax imposed by each county and municipal government, the actual sales tax rate for sales occurring within a particular county or municipality may be higher than, equal to, or lower than the uniform use tax rate of 5.725%. With respect to any particular county or municipality, the sum of the sales tax rates imposed on the state level and the county/municipality level is hereinafter referred to as the "aggregate sales tax rate."

Following are percentages of the total dollar amount of taxable sales made in Missouri for calendar year 1990[1], in which the aggregate sales tax rate imposed would have been less than, greater than, or equal to the uniform Missouri use tax rate:

1. 6.86% of all taxable sales in Missouri occur in counties where the aggregate sales tax rate is less than the uniform use tax rate. These are the instances in which Petitioners object.

2. 55.32% of all taxable sales in Missouri occur in counties where the aggregate sales tax rate is greater than the uniform use tax rate. In these counties, the Missouri sales/use tax statutes have the effect of encouraging interstate sales over intrastate sales. Petitioners' argument ignores the importance of this effect.

3. 37.82% of all taxable sales in Missouri are made in counties where the sales and use tax rates are equal.[2]

Based on taxable sales made in Missouri during 1990, if Missouri had imposed a statewide uniform sales tax rate of 5.725% (*i.e.*, a rate equal to the uniform use tax rate) in place of the aggregate sales taxes imposed in the various Missouri counties and municipalities, approximately $100 million less in sales taxes would have been imposed.

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[1] In the lower courts, the parties stipulated to these figures that reflect taxable sales made in Missouri for calendar year 1990.

[2] As they did in the lower courts, Petitioners argue that the impact on interstate commerce in the instant case should not be based on percentages of the total Missouri sales market but rather on percentages based upon the number of Missouri counties or Missouri population. Contrary to Petitioners' assertion, the impact of a sales and use tax can only be measured by the dollar amount of sales since that is the basis for their imposition. To illustrate, if 100% of all Missouri sales and purchases occurred in locations where the sales and use tax rates were identical, no economic disparity or discrimination would in fact occur; and this is so regardless of population or number of counties.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS DID NOT EXHAUST THEIR RIGHTS OF REVIEW BEFORE THE MISSOURI SUPREME COURT

The Brief in Opposition to the Petition for Writ of Certiorari of Respondents-Intervenors contains a complete and thorough argument that this Court should not exercise its discretion to grant the Writ of Certiorari in this case on the basis that Petitioners, by not filing a motion for rehearing with the Missouri Supreme Court pursuant to Rule 84.17, Missouri Rules of Civil Procedure, did not exhaust their rights of review before the Missouri Supreme Court. Respondent Lohman joins with Respondents-Intervenors that the Writ of Certiorari should not be granted for this reason but in the interests of brevity, does not repeat the argument herein.

II. PETITIONERS DO NOT HAVE STANDING IN THIS COURT UPON THE RECORD IN THIS CASE TO CHALLENGE THE CONSTITUTIONALITY OF MISSOURI'S USE TAX LAW.

For the reasons stated in Respondents-Intervenors Brief in Opposition to the Petition for Writ of Certiorari, Respondent Lohman joins with Respondents-Intervenors that Petitioners do not have standing to challenge the constitutionality of Missouri's use tax law in this case. In the interests of brevity, the discussion contained in Respondents-Intervenors brief is not repeated herein.

III. MISSOURI'S SALES/USE TAX STATUTES, HAVING THE OVERALL EFFECT OF PROMOTING INTERSTATE COMMERCE, DOES NOT VIOLATE THE COMMERCE CLAUSE; *GENERAL AMERICAN* REQUIRES THE RESULT REACHED BY THE MISSOURI SUPREME COURT AND IT SHOULD NOT BE OVERRULED.

A. Petitioners' Argument Ignores The Overall Effect Of The Missouri Sales/Use Tax Statutes.

Petitioners contend that the additional use tax statute of § 144.748, RSMo, discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.[3] Such contention is premised on the fact that under the Missouri sales/use tax statutes, various Missouri counties have an aggregate sales tax rate which is lower than the uniform Missouri use tax rate.

Petitioners ignore and/or attempt to mitigate the importance of the fact that other counties of Missouri, including the state's most populous counties, have aggregate sales tax rates which exceed the uniform Missouri use tax rate. As an illustration of their position, Petitioners on page 10 of their Petition provide an example of an Illinois mail order house that sells computers to residents of Dexter or Kennett, Missouri. The example states that because the aggregate sales tax rate at such locales is less than the uniform Missouri use tax rate, the mail order house finds itself at a competitive disadvantage to the local Apple distributor. Petitioners argue that this alone invalidates the Missouri use tax even though the counties in which these instances occur represent only 6.86% of the Missouri sales market. Petitioners,

[3] For purposes of simplification and without changing substantive analysis, Petitioners' constitutional objection to the additional use tax statute of § 144.748, RSMo, is hereinafter referred to as an objection to the operation of Missouri's sales/use tax statutes as a whole.

however, failed to mention in their example that the same Illinois mail order house has a competitive advantage over local Apple distributors located in Missouri counties which represent 55.32% of the Missouri sales market and is on an equal footing in the remaining counties of Missouri.[4]

B. No Case Cited And Relied On By Petitioners Supports Their Argument That Each Instance Of Interstate Commerce Should Be Isolated Without Taking Into Account The Overall Effect Of The Missouri Sales/Use Tax Statutes.

Petitioners in effect argue that each and every instance of interstate commerce must be treated equally under Missouri's sales/use tax statutes and that the overall effect of the tax statutes is not the "pivotal issue." Their argument requiring isolation of specific instances of Missouri's sales/use tax statutes without taking into account its overall effect is not supported by any case in which they rely.

Petitioners place principal reliance on the following four decisions of this Court: *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64 (1963); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); and *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). Contrary to Petitioners' assertion, these cases do not hold that each transaction affected by complementary sales/use tax statutes is to be placed in a vacuum and isolated for purpose of Commerce Clause analysis. Equally as important, these cases do

[4] It is notable that Petitioners are companies located in Missouri and do not represent non-Missouri companies such as the Illinois mail order house. It is economically unlikely that a non-Missouri company such as the Illinois mail order house would object to the overall economic advantage that such companies have in counties which comprise 55.32% of Missouri's sales market with areas of economic disadvantage constituting only 6.86% of Missouri's sales market.

not conflict with this Court's opinion in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925) which requires analysis of the overall effect of complementary sales/use tax statutes to determine whether it discriminates against interstate commerce.

In *Halliburton*, the Louisiana use and sales tax rates were identical but applied to differing tax bases depending upon whether certain specialized oil production equipment was manufactured in Louisiana or another state. If the equipment was manufactured outside of Louisiana, the tax basis for application of the Louisiana use tax included labor and overhead costs incurred in the manufacturing process. If the equipment was manufactured in Louisiana, the tax basis did not include labor and overhead costs.[5] The Court found that the additional tax burden imposed on out-of-state operations impermissibly favored local manufacturing of the equipment in Louisiana and, therefore, held that the Louisiana use tax violated the Commerce Clause.

In *Maryland v. Louisiana*, a use tax was imposed on oil and gas piped into Louisiana from the Outer Continental Shelf (OCS). Exemptions from the use tax and certain credits against the tax[6] applied where the OCS gas was used in certain commercial operations located in Louisiana, *i.e.*, the production of oil, natural gas, or sulphur and manufacture of fertilizers. Non-Louisiana use of the OCS gas would bear the full burden of the use tax. The Court held that the use tax violated the Commerce

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[5] In *Halliburton*, the manufacturer was also the user of the equipment. If the equipment was manufactured in Louisiana, sales or use tax would be imposed on the materials used in manufacturing the equipment *i.e.*, sales tax for materials purchased within Louisiana and use tax for materials purchased outside Louisiana. The net effect, however, was that no tax would apply to non-material costs, *i.e.*, labor and overhead costs.

[6] Credits against the use tax were provided for severance tax paid by taxpayers engaged in the production of oil and gas in Louisiana.

Clause by impermissibly discriminating in favor of local interests through the various credits and exemptions.[7]

In *Bacchus*, Hawaii imposed a 20% excise tax on sales of liquor at wholesale. To stimulate and encourage liquor production in Hawaii, sales of certain brandy and pineapple wine manufactured in Hawaii were exempted from the excise tax. This Court found that the exemption from the excise tax for the locally produced brandy and pineapple wine had both a discriminatory purpose and discriminatory effect. The economic protectionism of the exemption was held to violate the Commerce Clause despite evidence that sales of the locally produced brandy and pineapple wine constituted less than 1% of the total liquor sales in Hawaii.[8]

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[7] In *Maryland v. Louisiana*, this Court, in concluding that further hearings were not required to determine the extent of the discrimination, stated that "[w]e need not know how unequal the tax is before concluding that it unconstitutionally discriminates." 451 U.S. at 759-760. Petitioners misinterpret this passage to mean that if any instance of interstate commerce is treated unequally under Missouri's sales/use tax statutes, the statutes unconstitutionally discriminate. The facts of the case do not support this interpretation. The Court by such passage was merely recognizing that the exemptions and credits operated in a discriminatory manner in each and every instance that they applied and, therefore, could have nothing but a discriminatory effect. In such case, the actual dollar amount or extent of discrimination is immaterial. In the instant case, and contrary to *Maryland v. Louisiana*, the evidence shows that the Missouri sales/use tax statutes produce instances in which interstate commerce is burdened *less* than intrastate commerce and as a whole, promotes interstate commerce over intrastate commerce.

[8] Petitioners, on Page 11 of their Petition, emphasized that this Court in *Bacchus* rejected a "de minimis" argument based on a substantially smaller percentage of overall sales volume (less than 1%) than is present here (6.86%). Again, Petitioners argue the case out of context. In *Bacchus*, like the situation in *Maryland v. Louisiana*, the exemption operated in a discriminatory manner in each and every instance it applied. Since only discrimination could occur by application of the exemption, this Court, citing *Maryland v. Louisiana*, did not entertain an argument as to how unequal the tax is before

(Footnote 8 continued on next page)

In *Armco*, a gross receipts tax was imposed on all sales of tangible property at wholesale except goods sold at wholesale which were manufactured by local manufacturers. The local manufacturer, however, was subject to a manufacturing tax which exceeded the gross receipts tax. In assessing whether the gross receipts tax discriminated against interstate commerce, this Court held that the gross receipts tax and the manufacturing tax were not complementary taxes since manufacturing and wholesaling were not substantially equivalent events. Because the manufacturing tax was not considered in determining whether discrimination existed, this Court held that the exemption from the gross receipts tax for local manufacturers violated the Commerce Clause.

The critical factual distinction between the present case and *Halliburton*, *Maryland v. Louisiana*, *Bacchus*, and *Armco* is that in each of these cases the particular aspect of the sales or use tax under examination operated in a discriminatory manner each and every instance in which it applied. In *Halliburton*, because of the differing tax bases of the specialized equipment, the Louisiana use tax operated in a discriminatory manner each and every time the equipment was manufactured outside of Louisiana. In *Maryland v. Louisiana*, the exemptions and credits provided with respect to imposition of Louisiana's use tax had a discriminatory effect each and every time the OCS gas was not used for production of oil, natural gas, sulphur, or fertilizers within the state of Louisiana. In *Bacchus*, the exemption from the excise tax for brandy and pineapple wine manufactured in Hawaii discriminated against all other liquors sold in the state each and every

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(Footnote 8 continued)

concluding that it unconstitutionally discriminated. 468 U.S. at 269. Comparison of the percentage of sales volume in *Bacchus* and the present case is inappropriate since the Missouri sales/use tax statutes favor interstate commerce both in individual instances and as a whole.

time the brandy or pineapple wine was purchased. Finally, in *Armco*, the exemption from the gross receipts tax operated in a discriminatory manner in favor of local manufacturers each and every time such manufacturers sold their manufactured goods at wholesale.

The cases relied on by Petitioners did not present the current situation where complementary sales/use tax statutes operate in a manner which not only produce instances in which interstate commerce is burdened less than intrastate commerce, but favor interstate commerce overall. The Missouri Supreme Court found these distinctions to be controlling. As it stated on page A-16 of its Opinion, the discriminatory effect in the cases relied on by Petitioners occurred "both on an individual basis and on an average statewide basis" and "[i]n no such case was the use tax ever less than the sales tax."

Other cases in which Petitioners rely were likewise distinguished by the Missouri Supreme Court for the same reasons. The decisions in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278 (Okla. 1978); and *American Modulars Corporation v. Lindley*, 376 N.E.2d 575 (Ohio 1978) all involve situations where the sales/use tax statutes can only have the effect of discriminating against interstate commerce.

C. *General American* Requires The Result Reached By The Missouri Supreme Court.

The Missouri Supreme Court in its opinion held that the overall effect of the Missouri sales/use tax statutes was the determining factor in the instant case and not the individual instances where inequality existed. This holding is supported

and required by this Court's decision in *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1925).[9]

In *General American*, nonresident railroad companies were assessed a Louisiana state tax equal to 25 mills per dollar of rolling stock used in the state. Each of the several parishes of Louisiana and the municipalities in the parishes assessed a local tax which applied to rolling stock of railroad companies domiciled in that particular parish. The rate of local tax varied among the parishes and municipalities with rates at below and above 25 mills per dollar of rolling stock. However, it was found by the lower state courts that the average rate of local tax imposed by the various parishes and municipalities was 25 mills. Nonresident railroad companies, although subject to the 25 mill flat tax imposed on the state level, were exempt from the local taxes imposed by the parishes and municipalities.

The taxpayer in *General American* argued that the state tax discriminated against nonresident railroad companies in violation of the Commerce Clause and the Equal Protection Clause of the U.S. Constitution. Upon analyzing the complementary nature of the tax imposed on the state and local levels, the Court held that the overall taxing scheme did not violate either the Commerce Clause or the Equal Protection Clause. In so holding, the Court stated:

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[9] Petitioners claim that the Missouri Supreme Court's reliance on *General American* is misplaced since it is not a sales/use tax case and the portion of the opinion relied upon deals only with the Equal Protection Clause. Petitioners, however, provide no reason why the Court's rationale in *General American* with respect to the complementary state and local excise taxes are not equally applicable to complementary sales and use taxes. In addition, the opinion in *General American* does not formally separate the Commerce Clause and Equal Protection issues, but rather applies its analysis of weighing the effect of the state and local excise taxes for both issues.

> There being no question as to the amount of the tax or the method of its computation, the taxation of appellant's property within the state can be open to no objection, unless it operates to discriminate in some substantial way between the property of the appellants and the property of residents or domiciled nonresidents.
>
> * * *
>
> We are not concerned with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions. That is a matter within the competency of the state legislature.
>
> * * *
>
> The court below found . . . that all local taxes throughout the state, from which the appellants are exempted by the Louisiana constitution, average approximately 25 mills and since the tax assessed [on the state level] was substantially the equivalent of the local tax in lieu of which it was assessed, there was no unjust discrimination.
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> * * *
>
> Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. 270 U.S. 372-373.

This Court's decision in *General American* clearly establishes that in assessing the constitutionality of complementary sales/use tax statutes in which all instances of taxation are not equal, the overall effect of the statutes is the proper point of analysis. The principal enunciated in *General American* has been relied on by other state courts in upholding use taxes where specific

instances of inequality existed but where the overall scheme was deemed fair. *Lane Construction Corp. v. Comptroller of the Treasury*, 178 A.2d 904 (Md. 1962); *Don McCullagh, Inc. v. State*, 93 N.W.2d 252 (Mich. 1958); *Consolidated Freightways v. Department of Revenue*, 447 N.W.2d 44 (Wis. 1991); *WKBH Television v. Wisconsin Department of Revenue*, 250 N.W.2d 290 (Wis. 1977); and *Department of Revenue v. Warren Petroleum Corporation*, 119 N.E.2d 215 (Ill. 1954). Petitioners' argument for isolation of specific instances of Missouri's complementary sales/use tax statutes instead of analyzing its overall effect is contrary to the mandate of *General American*.

The Missouri Supreme Court in its opinion, relying on *General American* and *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), correctly upheld the Missouri use tax by weighing the relative advantage and disadvantage that interstate commerce has in the Missouri sales market. In summary, the Missouri Supreme Court stated as follows:

> The use tax enacted by § 144.748 was calculated to produce a statewide result of a lesser burden on interstate commerce than exists for intrastate commerce. The stipulated facts indicate that for 1990, the use tax at issue would have resulted in approximately $100,000,000 less in overall tax liability than the corresponding sales taxes. When combined with the fact that 93.14% of the 1990 sales would have resulted in use taxes either at the same or at lower rates than the complementary sales tax, it is apparent that the tax was designed, and apparently works, to avoid discrimination on a statewide basis.
>
> * * *
>
> Under a "practical analysis" or "practical effect" test, § 144.748 passes scrutiny. In a state where a permissive system of local sales tax is allowed, the adoption of a statewide complementary use tax that results in a dollar for

> dollar match is most likely impossible. The Missouri legislature appears to have prudently set the use tax rate established by § 144.748 at a level that taxes most transactions at a lower rate than the sales tax rate. On a statewide basis "interstate commerce," as such, is not discriminated against. While in certain localities the use tax may exceed the sales tax and while individual purchasers may choose [sic] to take advantage of these discrepancies on occasion, we must recall that while the Commerce Clause portects "interstate commerce," it does not require identical treatment of all taxpayers. In short, we do not find that appellants have established a discrimination that produces the type of "real injury" required by *Gregg Dyeing Co.* to invalidate a tax. Missouri Supreme Court Opinion at A-17 and A-18.

D. *General American* Is Not Inconsistent With *Halliburton, Maryland v. Louisiana, Bacchus*, And *Armco* And, Therefore, Should Not Be Overruled.

In their second ground for granting the writ of certiorari and as their second issue presented in this case, Petitioners argue that *General American*, to the extent it requires the result reached by the Missouri Supreme Court, is inconsistent with the decisions in *Halliburton, Maryland v. Louisiana, Bacchus*, and *Armco* and, therefore, should be overruled. As discussed previously, the latter cases cited and relied upon by Petitioners did not involve complementary sales and use tax statutes which favored interstate commerce in specific instances and overall. The Missouri Supreme Court correctly found that these cases are factually distinguishable from *General American* and, therefore, are not controlling. The decision in *General American* is factually on point and controlling in this case. Petitioners have simply failed to show any compelling reason to overrule *General American*.

CONCLUSION

Because of the reasons stated above, Petitioners have failed to show that they are entitled to relief and therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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